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Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND THE TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Petitioners,

v.

MILHELM ATTEA & BROS, INC. AND ELIAS H. ATTEA, JR.,

Respondents.

On Writ Of Certiorari To The Court Of Appeals Of The State Of New York

BRIEF FOR THE MUSCOGEE (CREEK) NATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state may regulate and tax commerce between a state cigarette wholesaler and an Indian tribe.

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COMES NOW the Muscogee (Creek) Nation and submits the following brief pursuant to Supreme Court Rule 37.3.

CONSENT TO FILING

The parties have consented to the filing of this brief. Letters memorializing this consent will be filed simultaneously with this brief.

INTEREST OF *AMICUS CURIAE*

Amicus curiae is the Muscogee (Creek) Nation (hereafter "Muscogee"), a federally-recognized Indian tribe, whose national capital is located near Okmulgee, Oklahoma. The Muscogee exercise jurisdiction over Indian country that overlaps 11 counties created by the State of Oklahoma, *e.g.*, Tulsa is an "old Creek town."[1] The Muscogee were removed on the "Trail of Tears"[2] to Indian Territory from their homelands in Georgia and Alabama. Within their Indian

[1] Angie Debo, *A History of the Indians of the United States* 4 (Norman, 1970).

[2] "The tragic suffering of the exiles on the Trail of Tears is familiar to all students of American history. It is matched only by the saturnalia of exploitation to which they were subjected by land speculators who crowded them from their homes before the time fixed for their emigration, and who possessed themselves of their individual allotments by every possible combination of violence and fraud." Angie Debo, *And Still the Waters Run* 5 (4th ed. Princeton Paperback Printing, 1991).

country, the Muscogee are wholesalers and retailers of tobacco products, including cigarettes. The Muscogee interests in this suit are: (1) Oklahoma, like New York (the petitioner), has misconstrued the *Potawatomi* decision[3] as authorizing states to legislatively impose regulations and taxes on cigarette trade with Indian tribes; (2) Oklahoma has seized Muscogee cigarettes and a vehicle pursuant to the putative authority of Oklahoma's unilateral, legislative solution;[4] and (3) the Muscogee are attempting to negotiate a compact with Oklahoma to resolve the cigarette tax dispute. If the decision below is not affirmed, the Muscogee may suffer further state depredations and be effectually precluded from compacting a resolution of tribal-state conflicts.

ARGUMENT

In adopting regulatory and taxing laws that burden wholesale cigarette trade with Indian tribes, petitioners (hereafter "New York") claim to be merely following *dicta* from a recent Supreme Court opinion. New York relies on the following language:

> And under today's decision, states may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville, supra* [447 U.S.] at 161-162, or by assessing wholesalers who supply unstamped cigarettes to the tribal stores, *City Vending of Muscogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (CA10 1990). States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. *See* 48 Stat. 987, as amended, 25 U.S.C.A. § 476. And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress.

Potawatomi, 498 U.S. at 514 (hereafter "*Potawatomi dicta*"). This language does not suggest that states can unilaterally solve their Indian commerce problems by legislative *fiat*. In fact, the opposite can be inferred. If state legislation was the answer, this Court would have only had to suggest that the state pass a law.

New York's regulatory and taxing scheme[5] effectively tells Indian traders that they may not engage in Indian commerce unless certain state rules[6] are followed. This is not only an invasion of constitutionally-established prerogatives, it is an attempted state pre-emption of federal law. The only *legislative* suggestion in the *Potawatomi dicta* is for the states to "seek appropriate legislation from Congress." This suggestion is consistent with the specific constitutional delegation of the authority for Congress to regulate trade with Indian tribes. U.S. Const. art. I, § 8, cl.

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[3] *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991).

[4] 1992 Okla. Sess. Laws 1643, c. 339, codified at Okla. Stat. tit. 68, §§ 346-352 and §§ 424-429 (Supp. 1993).

[5] New York Tax Law, §§ 471, 474, 481, 1814, 1846, 1847; 20 N.Y. CRR §§ 335.5 and 336.7. Copies of these statutes are in the appendix to petitioner's brief.

[6] The "power to regulate commerce . . . [is the power] to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)

3. This authority was not delegated to the federal judiciary[7] nor to state legislatures. New York would allow states to unilaterally regulate Indian trade without the aid of federal law in contravention of the United States Constitution.

REASON FOR AFFIRMING THE DECISION BELOW

New York has asserted legislative power to unilaterally resolve cigarette tax collection problems with Indian tribes, but is now complaining to this Court when its own highest appellate court recognized this power grab, but refused to sanction it. "[W]e do not read the Court's suggestion for collection remedies as altering the established law regarding Federal preemption or validating comprehensive regulation by a State of the relationship between Indian traders and their Indian purchasers." *Milhelm Attea & Bros., Inc. v. Dept. of Taxation and Finance of New York*, 81 N.Y.2d 417, 427, 615 N.E.2d 994, 998, 599 N.Y.S.2d 510, 514 (1993).

The power to regulate Indian trade is specifically granted to Congress. This grant, like the other portions of

[7] "It is the Congress, and not the judicial department, to which the constitution has given the power to regulate commerce . . . The courts can never take the initiative on this subject." *Transportation Co. v. Parkersburg*, 107 U.S. 691, 701 (1883). New York implies that the only restraint on the state's power to regulate and tax trading with Indian tribes is whether or not this Court agrees with states that such regulation "is sound policy." *Br. for Pet.* at 19. Thus, New York is seeking to enlarge the federal judicial authority to include policy-making that is exclusively the province of Congress and the President.

the Commerce Clause ("among the States" and "with Foreign nations") was an explicit recognition of the need for one authority (the federal legislature, not the states) to regulate trade with Indian tribes. An implicit reason for this grant of authority was to protect the federal interest in treaties negotiated and to be negotiated by the United States with Indian tribes.[8] Had the states the authority to regulate Indian trade, tribes undoubtedly would not exist today.[9] If New York is permitted to regulate and tax

[8] Prior to ratification of the constitution, Indian treaties included clauses such as: "[The tribes acknowledge that they are] under the protection of the United States and of no other sovereign whatsoever . . . For the benefit and comfort of the Indians, and for the prevention of injuries and oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians." *Treaty with the Chickasaw*, 1786, 7 Stat. 24, arts. II and VIII (Jan. 10, 1786). Most treaties subsequent to the adoption of the constitution contained specific guarantees by the federal government to protect tribes from state incursion on tribal jurisdiction. *See, e.g., Treaty with the Creeks, 1856*, 11 Stat. 699, art. 4 (Aug. 7, 1856) ("The United States do hereby, solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek.").

[9] When the political situation has been advantageous, states have unlawfully seized unilateral remedies to deprive tribes of rights protected by federal law. Just such a situation existed when this court decided *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). "Conflict between state and tribal government was not, however, all that was involved in *Worcester* . . . . The unilateral legislative action of the state of Georgia, and similar actions taken simultaneously by Mississippi, Tennessee, and other states, were in part attributable to the election of Andrew Jackson as president. Jackson was perceived as an avowed enemy to Indian interests in the affected states (despite his military alliance with some of the affected tribes), and these

Indian commerce, those tribes who have signed compacts with states[10] will have negotiated for naught. If compacting states have the power to unilaterally regulate Indian commerce, they will have no need to compact with Indian tribes and will either ignore existing compacts[11] or simply not renew them.

NEW YORK'S LAWS REGULATING AND TAXING CIGARETTE TRADE WITH INDIAN TRIBES ARE CONTRARY TO THE INDIAN COMMERCE CLAUSE AND THE INDIAN TRADER STATUTES

The constitutional grant of authority to Congress is "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Implicit in this language is that commerce with Indian tribes is separate and distinct from commerce with foreign nations and among the several states. However, the grant of power is identical ("to regulate"). The Federal Constitution arose

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states properly perceived that the federal government under Jackson's stewardship would not interfere in their unilateral extension of state authority over the tribe. Indeed, at least one historian has attributed to Jackson the following famous retort to the *Worcester* decision: 'John Marshall has made his decision; now let him enforce it.'. . . . For several years the Supreme Court decision was simply ignored – unprecedented constitutional phenomena, then and now." Robert N. Clinton, *et al.*, *American Indian Law* 28 (3rd ed. Michie Co., Va. 1991).

[10] "States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax" is one of the solutions suggested in the *Potawatomi dicta*.

[11] At least 9 tribes in Oklahoma have entered tribal/state compacts resolving cigarette tax disputes.

from an experience with the Articles of Confederation that the central government simply had insufficient power to properly function.

> The Commerce Clause is said to have been suggested by James Monroe of Virginia, afterwards President, who believed national regulation 'necessary to preserve the union; without it, it will infallibly crumble to pieces.' As a member from 1783 to 1786 of the Congress under the Articles of Confederation, he endeavored to secure for Congress the power to regulate commerce and thereby remove what he considered the **chief defect in the existing government**.

Thomas James Norton, *The Constitution of the United States, Its Sources and Its Applications* 51 (8th ed. The World Pub. Co., Cleveland & New York, 1943) (emphasis added). Accordingly, the grants of powers by the states to the federal government were intentionally greatly strengthened when the Constitution was adopted by the states. This was certainly true of the portion of the Articles of Confederation that discussed trade with the Indians: "[Congress has] the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, **not members of any of the states**, provided that legislative right of any state within its own limits be not infringed or violated . . . " *Articles of Confederation*, art. IX, ¶ 5 (emphasis added), reprinted in the U.S.C.A., U.S. *Const.* art. I, p. 11. Thus, when the Constitution was adopted, the clear inference was that the federal government was granted all of the power over Indian commerce to the exclusion of the states.

> Antecedently to the American Revolution the authority to regulate trade and intercourse

with the Indian tribes, whether they were within, or without the boundaries of the colonies, was understood to belong to the prerogative of the British crown. And after the American Revolution, the like power would naturally fall to the federal government, with a view to the general peace and interest of all the states. Two restrictions, however, upon the power were incorporated with it into the confederation, which occasioned endless embarrassments and doubts . . . In this case, as in some other cases, the Articles of Confederation inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the states; to subvert a mathematical axiom, by taking away a part, and letting the whole remain. The constitution has wisely disembarrassed the power of these two limitations; and has thus **given to congress, as the only safe and proper depository, the exclusive power**, which belonged to the crown in the ante-revolutionary times; **a power indispensable to the peace of the states, and to the just preservation of the rights and territory of the Indians** . . .

. . . It is (says a learned commentator) wholly immaterial, whether such tribes continue seated within the boundaries of a state, and inhabit part of a territory, or roam at large over lands, to which the United States have no claim. The **trade with them is, in all its forms, subject exclusively to the regulation of congress**. And in this particular, also, we trace the wisdom of the constitution. The Indians, not distracted by the discordant regulations of different states, are taught to trust one great body, whose justice they respect, and whose power they fear.

Joseph Story, *Commentaries on the Constitution* §§ 533-534 (Carolina Academic Press 1987) (1833) (emphasis added).

The Commerce Clause has been construed to preclude any state-imposed burden on interstate trade either *per se* or pre-emptively if congressional enactments signal an intention to "occupy the field." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In either event, the New York statutes run afoul of federal law.

In construing the interstate regulatory power, this Court has recognized the practicalities of commerce among the states and adopted a two-prong doctrine. *First*, congressional power is exclusive as to those phases of interstate commerce requiring "uniform regulation." *Second*, for those phases not requiring uniform regulation, the states enjoy a concurrent power of regulation subject to Congress' overriding power. *James Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 327 (1917). However, the history and practicalities of Indian commerce (as undoubtedly with foreign commerce) are such that this Court should construe the Indian commerce clause as granting exclusive power.[12]

Chief Justice Marshall in the seminal Interstate Commerce case explained that the commerce power is not "in its own nature . . . capable of residing in, and being exercised by, different authorities at the same time." *Gibbons*, 22 U.S. at 199-200. This language is even more

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[12] Several Indian tribes have Indian country in more than one state, e.g. Navajo Indian Reservation (Arizona, New Mexico and Utah), Standing Rock Indian Reservation (North Dakota and South Dakota).

appropriate in describing Indian commerce. As Marshall went on to say, "[a state in regulating interstate commerce] is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." New York's desire to collect cigarette taxes is simply not a sufficient legal reason for judicially amending the Federal Constitution.[13]

Even if the Indian commerce clause is not construed as an exclusive grant of power, Congress has clearly pre-empted and fully occupied the field of Indian trading. New York argues that the Indian trader statutes were not enacted to allow tribes to "market a tax exemption." The legislative intent, except as to whether Congress intended to occupy the field, is not relevant to the question of federal pre-emption. Federal pre-emption will always have effects not contemplated nor intended. The intent of the federal Indian trader statutes was, as this Court has previously held, to occupy the field of Indian commerce.

> Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's, not simply because those activities take place on a reservation, but rather because Congress in the exercise of its power granted in Article I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject.

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[13] *Cf. Dean Milk Company v. City of Madison*, 340 U.S. 349 (1951). A legitimate state objective does not validate state laws imposing burdens on interstate commerce.

Warren Trading Post Company v. Arizona Tax Commission, 380 U.S. 685, 691 n. 18 (1965). If an incidental result of the Indian trader statutes is that goods can be purchased cheaper in Indian country than in the surrounding state, this does not *ipso facto* empower New York to ignore federal pre-emption any more than a similar price differential would authorize New York to regulate trade with New Jersey or Potomac, Maryland, to regulate trade with Rockville, Maryland. Tax rate differentials among communities exist everywhere and do not lose their validity because one community has a lower rate, nor should they lose their validity simply because the community happens to be composed of Indians.

Tax differentials among adjacent jurisdictions are not anomalies, but consistent with the constitutional plan. The existence of these differentials acts as a natural limit on the apparently unrestrained inclination of politicians to raise taxes.

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.

H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 539 (1949).

Although the Indian trader statutes may not have anticipated tax differentials among adjacent tribal jurisdictions and states, they were adopted to occupy the field

of Indian commerce precluding state regulation as fully intended by the United States Constitution.

> It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them a 'sweep as broad as [their] language,' . . . and interpret them in light of the intent of the Congress that enacted them.

Central Machinery Company v. Arizona State Tax Commission, 448 U.S. 160, 166 (1980) (citations omitted).

By targeting a particular commodity (cigarettes) for special taxation, states, themselves, have created tax differentials and the perceived "cigarette tax collection problem with Indian tribes." States had the option of leaving cigarettes, like every other item, subject to sales taxes. However, because tobacco was a convenient tax target, states decided to tax cigarettes separately so that the rates of taxation could be raised without the magnitude of opposition that usually greets proposed increases in sales taxes.[14] The cigarette tax purports to be a tax on the ultimate consumer. However, this is not how states have structured the tax collection procedure. States pre-collect the tax from wholesalers who affix a stamp as proof that state cigarette taxes have been paid. This methodology differentiates "cigarette tax" collections from usual tax on

[14] *See* Br. of the States of Wash., *et al.* at 1, n. 2 (Dec. 15, 1993) (hereafter "States Br."). As Washington points out, it can tax cigarettes at nearly five times the rate of other items.

commodities sold to the "ultimate consumer."[15] One result of this state tax policy is that the smoker is now often paying more tax on a pack of cigarettes than he is paying for the commodity itself.[16] Cigarette tax rates would be politically impossible to impose on commodities in general. In targeting the sale of one commodity for special tax treatment, states have unilaterally created their own tax collection problems.

As the market for tobacco products has declined, jurisdictions have correspondingly raised taxing levels to confiscatory levels. "[C]igarette consumption in 1993 will likely decline for the ninth consecutive year, continuing the pattern in 10 of the last 11 years." United States Department of Agriculture, *Tobacco Situation and Outlook Report*, TS-224, 4 (Sept. 1993). Total manufactured United States cigarette consumption reached a peak of 640 billion in 1981, but dropped over 20% during the next 10 years, reaching 510 billion by 1991. *Id.* at 4, Table 2; *see also* A2 to A4. *Per capita* consumption has dropped every year since 1973 (4,148) to an estimated 2,713 in 1991. *See* A4. Nevertheless, the State of Washington hopes to finance "a major health care measure" from new cigarette taxes. *See* States Br. at 4, n. 5. If these dreams of new tax revenues fail to materialize, states cannot accurately blame Indian tribes.

[15] States Br. at 3, n. 3.

[16] Using the State of Washington as an example, depending on the weight of the tobacco, between 44 to 58.98 percent of the cost of a carton of cigarettes is directly attributable to state and federal taxes. *See* A1.

To avoid the cost and inefficiencies of collecting taxes from individuals, the states seek to force tribes to be state tax collectors. The problem has arisen not from any Indian effort to market a tax exemption,[17] but from the states' targeting of a particular commodity for extraordinary taxation, thereby creating tax differentials that encourage consumers to purchase the taxed commodity in other jurisdictions. Only Congress is Constitutionally vested with the authority to regulate trade among consumers, retailers, wholesalers and Indian tribes. Unilateral state regulation of Indian commerce is Constitutionally impermissible and invades an area enjoyed exclusively by Congress.

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[17] *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980). *See Colville*, 447 U.S. at 159; *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976).

CONCLUSION

The decision of the Court of Appeals for the State of New York should be affirmed.

Respectfully submitted,

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Cost of Carton of Cigarettes in Washington

Federal tax	26 USCA 5701	Tax	Number of Cigarettes	Tax per Cigarette	Tax per Carton
	Less than 3 lbs per 1000	$12.00	1000	$0.01	$2.40
	Greater than 3 pounds per 1000	$25.20	1000	$0.03	$5.04

Carton		Per pack	Per carton	
	cigarettes	20	200	
Less than 3 lbs per 1000				
	Median Price	$17.70	100.00%	States' Amici Brf at 1, n.2
	Washington tax	$5.40	30.51%	States' Amici Brf at 1, n.2
	Federal tax	$2.40	13.56%	26 USCA 5701
	Direct taxes	$7.80	44.07%	
Greater than 3 pounds per 1000				
	Median Price	$17.70	100.00%	States' Amici Brf at 1, n.2
	Washington tax	$5.40	30.51%	States' Amici Brf at 1, n.2
	Federal tax	$5.04	28.47%	26 USCA 5701
	Direct taxes	$10.44	58.98%	

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Total Manufacturing U.S. Cigarette Consumption, 18 and Over

Four Year Periods	64	68	72	76	80	84	88	28 92	96
Total Consumption (billions)	511.3	545.6	566.8	613.5	631.5	600.4	562.5	510	
% change		6.71%	3.89%	8.24%	2.93%	-4.92%			
Per capita	4194	4186	4043	4092	3844	3446	3096	2713	
% change		-0.19%	-3.42%	1.21%	-6.06%	-10.35%	-10.16%	-12.37%	
					28	year	Change	-35.31%	
						Annual	Average	-1.26%	

Ten Year Period	81	82	83	84	85	86	87	88	89	90	91
Total Consumption (billions)	640	634	600	600.4	594	583.8	575	562.5	540	525	510
% change		-0.94%	-5.36%	0.07%	-1.07%	-1.72%	-1.51%	-2.17%	-4.00%	-2.78%	-2.86%
Per capita	3836	3739	3488	3446	3370	3274	3197	3096	2926	2817	2713
% change		-2.53%	-6.71%	-1.20%	-2.21%	-2.85%	-2.35%	-3.16%	-5.49%	-3.73%	-3.69%
								Per Capit	10-year change		-29.28%
									Annual Average		-2.93%
								Consumption			-20.31%
											-2.03%

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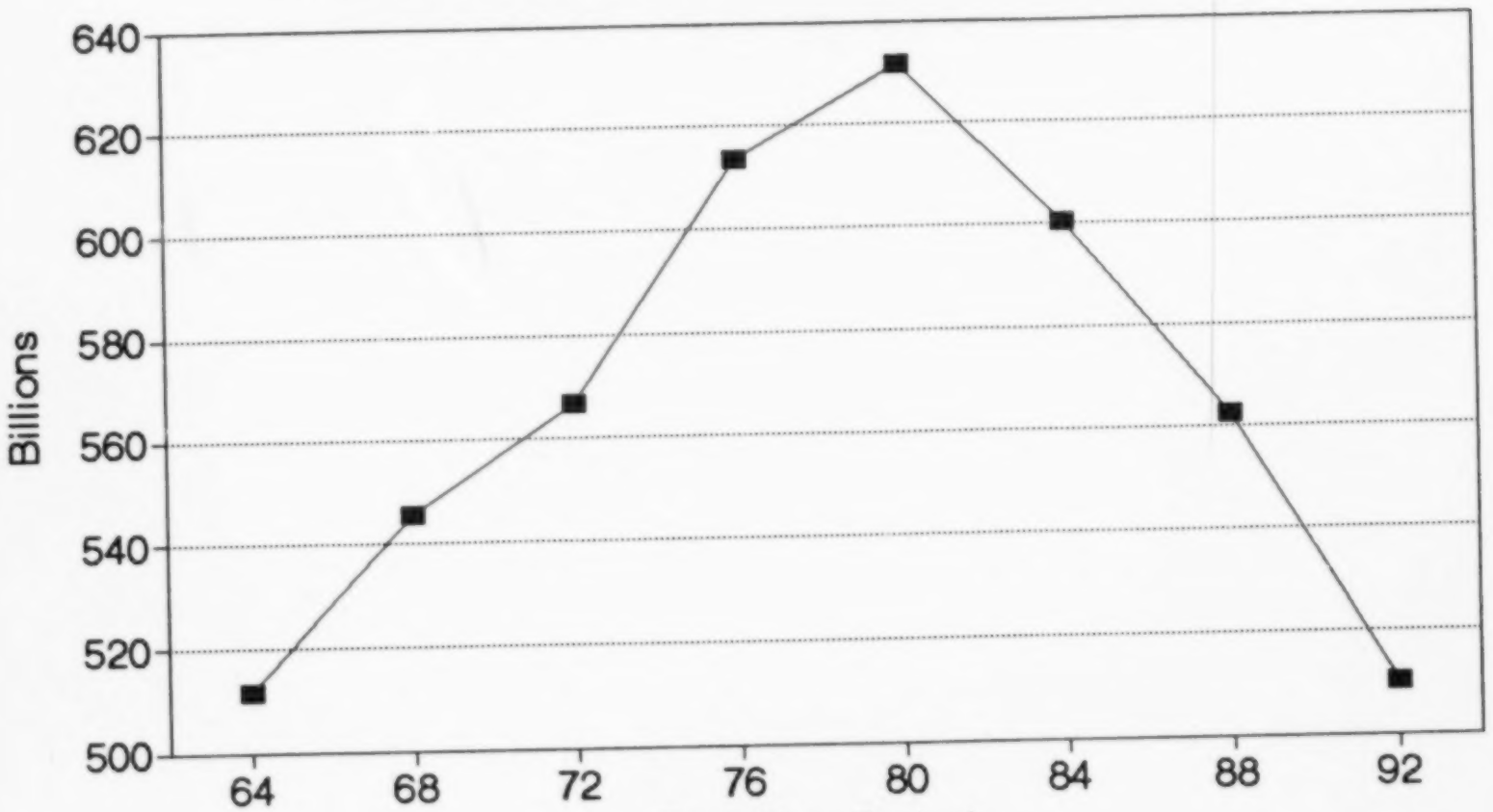
Tobacco Situation and Outlook Report," United States Department of Agriculture Economic Research Service, TS-224, p. 4 and Table 2 (Sept. 1993)

Total Cigarette Consumption

In US During 4 Year Periods from 1964



Cigarette Per Capita Consumption

In US During 10 Year Period from 1981